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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/993,158	11/16/2001	Kenneth B. Higgins	5113D	1180
7590 04/14/2005		EXAMINER		
Milliken & Company		JUSKA, CHERYL ANN		
P.O. Box 1926		ART UNIT		
Spartanburg, SC 29304		PAPER NUMBER		

1771

DATE MAILED: 04/14/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application No.

09/993,158

Applicant(s)

HIGGINS ET AL.

Examiner

Cheryl Juska

Art Unit

1771

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 24 January 2005.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) See Continuation Sheet is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) See Continuation Sheet is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |   |  |
|---|--|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)  | 4) <input checked="" type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. <u>0405</u> . |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)  | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)                                |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date <u>0205</u> . | 6) <input type="checkbox"/> Other: _____.  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection on January 24, 2005. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114.

### ***Response to Amendment***

2. Applicant's amendment filed January 24, 2005, with the RCE papers, has been entered. Claims 36, 37, 39, 50-57, 73-76, 80, 86, 87, 98, 101, 129, 132, 133, 137, 139, 140, and 142-150 have been cancelled, while claims 1-3, 22, 26, 38, 41, 42, 49, 58, 65, 66, 77, 79, 81, 82, 85, 88, 89, 117, 123, 130, 134, 136, 138, and 141 have been amended. New claim 151 has been added. Thus, the pending claims are 1-35, 38, 40-49, 58-72, 77-79, 81-85, 88-97, 99, 100, 102-128, 130, 131, 134-136, 138, 141, and 151.

3. The Letter filed September 23, 2004, discussing the substance of the September 15<sup>th</sup> interview and the Supplemental Kilpatrick Declaration filed January 24, 2005, have also been entered.

***Claim Rejections - 35 USC § 103***

4. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

5. Claims 1-4, 7-17, 19-25, 27-35, 40-42, 44-48, 88-97, 99, 100, 102-128, 130, 131, 134-136, 138, and 141 stand rejected under 35 U.S.C. 103(a) as being unpatentable over US 4,522,857 issued to HIGGINS in view of 5,610,207 issued to DE SIMONE et al. for the reasons of record.

New claim 151 is also rejected under 35 U.S.C. 103(a) as being unpatentable over US 4,522,857 issued to HIGGINS in view of 5,610,207 issued to DE SIMONE et al.

Applicant has amended the claims to limit the rebond foam to being flame laminated rebond. This amendment is insufficient to overcome the cited prior art rejection since it is a method limitation in an article claim. A method limitation is given weight to the extent that said limitation effects the structure of the final product. It is the examiner's position that the method of forming the rebond layer does not materially effect the final carpet tile. As such, the new limitation is not given patentable weight at this time.

6. Claims 5, 18, and 43 stand rejected under 35 U.S.C. 103(a) as being unpatentable over the cited HIGGINS and DE SIMONE patents as set forth above and in further view of EP 048 986 issued to DOW for the reasons of record.

7. Claims 6, 26, 38, 49, 65, and 66 stand rejected under 35 U.S.C. 103(a) as being unpatentable over the cited HIGGINS and DE SIMONE patents as set forth above and in further view of US 5,540,968 issued to HIGGINS for the reasons of record.

Art Unit: 1771

8. Claims 58-60, 62-64, 67, 69-72, and 77-79, 81-85 stand rejected under 35 U.S.C. 103(a) as being unpatentable over HIGGINS '857 in view of HIGGINS '968 for the reasons of record.

Claim 58 has been broadened to eliminate the limitation of two adhesive layers and a stabilizing layer, wherein the second adhesive layer is in contacting relation with the foam cushion layer. Claim 58 has also been amended to limit the foam cushion layer to being flame laminated to the layer of stabilizing material. However, as discussed above, the method of bonding is not given patentable weight at this time. Thus, claims 58-60, 62-64, 67, 69-72, and 77-79, 81-85 stand rejected.

9. Claims 61 and 68 stand rejected under 35 U.S.C. 103(a) as being unpatentable over the cited HIGGINS '857 and '968 patents as set forth above and in further view of US 5,616,200 issued to HAMILTON for the reasons of record.

***Claim Rejections - 35 USC § 102***

10. Claims 58-64, 67-72, 77-79, and 81-85 stand rejected under 35 U.S.C. 102(b) as being anticipated by US 2002/0034606 issued to Miller et al.

Broadened claim 58 is no longer limited to the two layer adhesive and stabilizing layer structure. However, Miller still anticipates the claimed structure. Note Figure 10A.

Claim 58 has also been amended to limit the foam cushion layer to being flame laminated to the layer of stabilizing material. However, as discussed above, the method of bonding is not given patentable weight at this time. Therefore, said claims stand anticipated by the cited Miller disclosure.

***Response to Arguments***

11. Applicant's arguments and the Kilpatrick Declaration have been considered in full, but have not been found to be persuasive. While said arguments and declaration establish the accepted wisdom in the art that rebond foam would not be suited for carpet tiles due to the lack of uniformity in thickness and density which produces a reduced strength and durability, the assertion of unexpected results has not been clearly established. Specifically, the declaration states, "It was surprising and unexpected that rebond foam would work as well as virgin polyurethane foam in a carpet tile." (Declaration, page 2, section 21). However, said declaration does not quantitatively describe said unexpected results. [Note this is not equivalent to stating the declaration is merely an opinion not supported by fact.] Additionally, while applicant argues carpet tiles having the same construction as the Milliken Comfort Plus<sup>®</sup> cushion back carpet tiles with the exception of the rebond foam layer were found to have similar performance characteristics, said arguments do not quantitatively describe the unexpected results. In other words, applicant has not clearly established the two carpet tiles having identical constructions other than the foam cushion backing (i.e., rebond vs. virgin polyurethane) have similar performance characteristics. It is well settled that unexpected results must be established by factual evidence. "Mere argument or conclusory statements in the specification does not suffice." *In re De Blauwe*, 222 USPQ 191. It is this equivalent performance that is unexpected in view of the accepted wisdom in the art that rebond foam is inferior to virgin foam in strength, durability, uniformity, etc.

12. As previously suggested—although, perhaps not clearly—in the follow-up telephonic interview on about September 20, 2004, it is recommended that applicant submit a signed

Art Unit: 1771

declaration describing in detail the construction of each carpet tile (e.g., face yarn composition and denier, face weight, thickness, and density, primary backing construction and weight, pre-coat layer composition and weight, hot melt composition and weight, reinforcement layer construction and weight, foam cushion back composition, weight, thickness, and density, and backing layer construction and weight). Said declaration should also include the results of performance tests that reflect the cushion layer of the carpet tile (e.g., cushion resilience, Herzog walking comfort rating, castor chair test, Gmax, etc.). It is noted that the scope of said declaration would establish the scope of allowable subject matter. For example, if the two carpet tiles are equivalent in all aspects except the foam composition (i.e., thickness and density of foam are alike), then the allowable subject matter would be a carpet tile having a rebond foam backing. However, say the two carpet tiles differ with respect to the foam layer composition and average foam density, then the scope of the allowable subject matter would be a carpet tile having the rebond foam layer and a specified foam density.

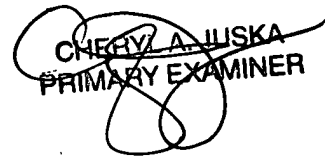
### ***Conclusion***

13. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Cheryl Juska whose telephone number is 571-272-1477. The examiner can normally be reached on Monday-Friday 10am-6pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Terrel Morris can be reached at 571-272-1478. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Art Unit: 1771

14. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
CHERYL A. JUSKA  
PRIMARY EXAMINER

cj  
April 12, 2005



Continuation of Disposition of Claims: Claims pending in the application are 1-35,38,40-49,58-72,77-79,81-85,88-97,99,100,102-128,130,131,134-136,138,141 and 151.

Continuation of Disposition of Claims: Claims rejected are 1-35,38,40-49,58-72,77-79,81-85,88-97,99,100,102-128,130,131,134-136,138,141 and 151.